Sunway Reit Holdings Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-610–08 OF 2022
SUPANG LIAN, LIM CHONG FONG AND ALWI ABDUL WAHAB JJCA
6 MARCH 2025

Revenue Law — Income Tax — Capital verses income — Appellant unit-holder in real estate investment trust ('REIT') company claimed it received distributions for return of capital from latter and did not subject same to income tax — Whether the 'return of capital' was in fact taxable income as evidence showed appellant had not made any contribution to capital assets of REIT company — Whether ss 33(1) and 39 of the Income Tax Act 1967 did not provide for apportionment of deductibility of interest expenditure based on taxable income

The appellant was an investment holding company holding 986,634,185 units in Sunway Real Estate Investment Trust ('Sunway REIT'). For the year 2011, the appellant claimed that it received from Sunway REIT distributions of income amounting to RM24,468,528 and distributions for return of capital amounting to RM8,781,044. The appellant excluded the 'return of capital' distributions from its tax assessment and also computed its deductible interest expenditure to be RM18,188,537.62 only (99.3% of RM18,316,912 after restricting RM128,374.38 against tax exempt distribution from exempt interest income). The respondent, however, informed the appellant that the RM8,781,044 it had classified as 'return of capital' was in fact taxable income and that pursuant to its Ruling No 2/2011, interest expenditure for purposes of income tax deductibility had to be apportioned between distributions of income and distributions of return of capital. The appellant's appeal to the Special Commissioners of Income Tax ('SCIT') against the respondent's decision was unsuccessful. So was its appeal to the High Court against the SCIT's decision. The instant appeal was against the High Court's decision.

Held, unanimously allowing the appeal, setting aside the High Court's decision and ordering that the full amount of interest expenditure amounting to RM18,188,537.62 incurred by the appellant be allowed for deduction against the appellant's taxable income for Year of Assessment 2011:

(1) The SCIT and the High Court rightly found that the return of capital made by Sunway REIT to the appellant was in fact distribution of income. As such, the income was taxable (see para 26).

(2) The appellant as unit trust holder was not conferred any interest in and

could not exercise any rights in respect of the assets of Sunway REIT based on the Sunway REIT trust deed. Consequently, the appellant did not enjoy the tax benefit of the industrial building allowance as claimed. There was no cogent proof that directly connected the appellant to the industrial building allowance claimed to be enjoyed by Sunway REIT (see paras 23–24).

(3) With regard to the apportionment of the deductibility of interest expenditure based on the taxable income received by the appellant, the SCIT and the High Court adopted the respondent's computation on the basis that the apportioned interest expenditure calculation had to be made between taxable and non-taxable distributions. On the contrary, the appellant contended that nothing in s 33(1)(a) of the Income Tax Act 1967 ('the ITA') allowed the respondent to apportion deductible expenses. The appellant's position was that its interest expenditure for 2011 was wholly deductible from the taxable income based on s 33(1)(a) of the ITA and that such deduction was not prohibited by s 39 of the ITA on non-allowable deductions (see paras 29–32).

(4) Sections 33(1) and 39 of the ITA did not provide for apportionment of expenditure. The respondent's Public Ruling No 2/2011 was therefore ultra vires and inapplicable. In the premises, the respondent's computation (affirmed by the SCIT and the High Court) of the deductible interest expenditure based on the apportionment of the appellant's income and return of capital (which was also found to be taxable income) was flawed. The proper computation for purposes of deductibility of the interest expenditure was that as calculated by the appellant (see paras 33 & 36).

[Bahasa Malaysia summary

Perayu ialah syarikat pelaburan yang memegang 986,634,185 unit dalam Sunway Real Estate Investment Trust ('Sunway REIT'). Bagi tahun 2011, perayu menyatakan bahawa Sunway REIT telah memberikan agihan pendapatan berjumlah RM24,468,528 dan pengagihan untuk pemulangan modal berjumlah RM8,781,044. Perayu mengecualikan pengagihan 'pulangan modal' daripada taksiran cukainya dan juga mengira perbelanjaan faedah yang boleh ditolak kepada RM18,188,537.62 sahaja (99.3% daripada RM18,316,912 selepas mengehadkan RM128,374.38 terhadap pengagihan dikecualikan cukai daripada pendapatan faedah yang dikecualikan). Responden bagaimanapun memaklumkan perayu bahawa RM8,781,044 yang telah diklasifikasikan sebagai 'pulangan modal' sebenarnya adalah pendapatan bercukai dan menurut Ketetapan No 2/2011, perbelanjaan faedah untuk tujuan penolakan cukai pendapatan perlu dibahagikan antara pengagihan pendapatan dan pengagihan pulangan modal. Rayuan perayu kepada Pesuruhjaya Khas Cukai Pendapatan ('PKCP') terhadap keputusan responden tidak berjaya. Begitu juga rayuannya kepada Mahkamah Tinggi terhadap

keputusan PKCP. Rayuan ini adalah untuk keputusan Mahkamah Tinggi.

Diputuskan, sebulat suara membenarkan rayuan, mengenepikan keputusan Mahkamah Tinggi dan memerintahkan jumlah penuh untuk perbelajaan faedah berjumlah RM18,188,537.62 yang diperoleh perayu dibenarkan untuk penolakan pendapatan bercukai perayu untuk Tahun Taksiran 2011:

(1) PKCP dan Mahkamah Tinggi dengan betul mendapati bahawa pemulangan modal yang dibuat oleh Sunway REIT kepada perayu sebenarnya adalah pengagihan pendapatan. Oleh itu, pendapatan tersebut boleh dikenakan cukai (lihat perenggan 26).

(2) Perayu sebagai pemegang unit amanah tidak diberikan sebarang kepentingan dan tidak boleh melaksanakan sebarang hak berkenaan dengan aset Sunway REIT berdasarkan surat ikatan amanah Sunway REIT. Oleh itu, perayu tidak menikmati faedah cukai untuk elaun bangunan perindustrian seperti yang dituntut. Tiada bukti yang meyakinkan yang secara langsung menunjukkan hubungan perayu dengan elaun bangunan perindustrian yang dikatakan dinikmati oleh Sunway REIT (lihat perenggan 23–24).

(3) Berkenaan dengan pembahagian penolakan perbelanjaan faedah berdasarkan pendapatan bercukai yang diterima oleh perayu, PKCP dan Mahkamah Tinggi menggunapakai pengiraan responden atas dasar bahawa pengiraan perbelanjaan faedah yang dibahagikan perlu dibuat antara pengagihan bercukai dan tidak bercukai. Sebaliknya, perayu berhujah bahawa tiada mana-mana dalam s 33(1)(a) Akta Cukai Pendapatan 1967 ('ACP') membenarkan responden untuk membahagikan perbelanjaan yang boleh ditolak. Pendirian perayu adalah bahawa perbelanjaan faedahnya untuk tahun 2011 boleh ditolak sepenuhnya daripada pendapatan bercukai berdasarkan s 33 (1)(a) ACP dan potongan tersebut tidak dilarang oleh s 39 ACP untuk potongan yang tidak dibenarkan (lihat perenggan 29–32).

(4) Seksyen 33(1) dan 39 ITA tidak memperuntukkan pembahagian perbelanjaan. Oleh itu, Keputusan Awam Responden No 2/2011 adalah ultra vires dan tidak terpakai. Atas premis tersebut, pengiraan responden (disahkan oleh PKCP dan Mahkamah Tinggi) untuk perbelanjaan faedah yang boleh ditolak berdasarkan pembahagian pendapatan perayu dan pulangan modal (yang juga didapati sebagai pendapatan bercukai) adalah tidak boleh dipertahankan. Pengiraan yang betul untuk tujuan penolakan perbelanjaan faedah adalah seperti yang dikira oleh perayu (lihat perenggan 33 & 36).]

Cases referred to

Chua Lip Kong v Director-General of Inland Revenue [1982] 1 MLJ 235, PC (distd)

IJM Corp Bhd v Zamri bin Hj Ibrahim & Anor [2014] 2 MLJ 335; [2014] 1 AMR 97, CA (refd)
Iskandar Coast Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2019] 5 MLJ 236; [2019] 6 MLRA 219, CA (refd)
K-ZAQ (M) Sdn Bhd v Johnson Matthey Public Ltd & Ors [2014] 1 MLJ 272, CA (refd)
Kenny Heights Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2015] 4 MLJ 487; [2015] 5 CLJ 923, CA (refd)
Ketua Pengarah Hasil Dalam Negeri v Perbadanan Kemajuan Ekonomi Negeri Johor [2009] 4 MLJ 682; [2009] MSTC 4399, CA (distd)
MY v Comptroller-General of Inland Revenue [1972] 2 MLJ 110, FC (refd)
Sunway Reit Holdings Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2023] MLJU 949; [2023] CLJU 809, HC (refd)

Legislation referred to

Income Tax Act 1967 ss 3, 4(f), 33, 33(1), (1)(a), 39

Appeal from: *Sunway Reit Holdings Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2023] MLJU 949 (High Court, Kuala Lumpur)

S Saravana Kumar (with Lim Chinn Wei and Nur Amira bt Ahmad Azhar) (Rosli Dhalan Saravana Partnership) for the appellant.
Ahmad Isyak bin Mohd Hassan (with Azleena bt Md Khairuddin) (Senior Revenue Counsel, Special Appeal Department, Inland Revenue Board Malaysia) for the respondent.

Lim Chong Fong JCA:

INTRODUCTION

[1] This is a tax appeal concerning the deductibility of interest expenditure.

[2] The appellant is a private limited company and a member of the Sunway group of companies.

[3] The respondent is the Director General of Income Tax.

[4] We heard the appeal on 28 November 2024 and thereafter adjourned our decision to deliberate on the arguments advanced by the parties.

[5] Having done so, we hereby give our decision below including the grounds thereof.

A BACKGROUND

[6] The appellant is an investment holding company and its sole source of investment is in 986,634,185 units in Sunway real estate investment trust ('Sunway REIT'). This investment was procured by way of a sale and purchase agreement dated 18 August 2011 executed between the appellant and Sunway Bhd ('SPA') financed by the appellant partly by assuming Sunway Bhd's loan from external banks amounting to RM989,753,502 and the balance by interest paying loan from Sunway Treasury Sdn Bhd amounting to RM105,410,443.35.

[7] The aforesaid commercial arrangement is the result of a merger exercise within the Sunway group wherein Sunway Bhd was formed upon the merger of Sunway City Bhd and Sunway Holdings Bhd. During the course of the merger, Sunway City Bhd sold the units in Sunway REIT to Sunway Bhd. These units in Sunway REIT were subsequently sold to the appellant pursuant to the SPA.

[8] The appellant has only one source of income via the distribution of total income received from Sunway REIT.

[9] In the year of tax assessment 2011, the appellant received distributions amounting to RM33,249,572 that comprised distributions of income amounting to RM24,468,528 and distributions for the return of capital amounting to RM8,781,044 from Sunway REIT.

[10] Thus, the appellant accordingly subjected the distributions of income amounting to RM24,468,528 to income tax under ss 3 and 4(f) of the Income Tax Act 1967 ('the ITA') but not the distributions for the return of capital amounting to RM8,781,044 which were not subjected to income tax based on the tax vouchers issued by Sunway REIT to its unit holders. Thus, the amount of deductible interest expenditure according to the appellant is RM18,188,537.62 only (99.3% of RM18,316,912 after restricting RM128,374.38 against tax exempt distribution from exempt interest income).

[11] The respondent however disagreed with the appellant's income tax treatment of the distributions for the return of capital received from Sunway REIT and the respondent on 5 July 2012 notified the appellant that interest expenditure for purposes of income tax deductibility must be apportioned between the distributions of income and distribution of return of capital pursuant to Public Ruling No 2/2011.

[12] Consequently, the appellant, on a without prejudice basis, submitted its tax return (Form C) as per the respondent's stance. Pursuant to the self-assessment income tax system, the aforesaid tax return is deemed to be the

notice of assessment served by the respondent on the appellant.

[13] As a result, the appellant on 29 August 2012 filed a notice of appeal ('Form Q') to the respondent and the respondent accordingly on 21 January 2013 forwarded the Form Q by way of a case stated to the Special Commissioners of Income Tax ('SCIT').

[14] After hearing the parties, the SCIT decided against the appellant primarily finding that the appellant's return of capital received from Sunway REIT is a taxable income ('deciding order').

[15] The appellant was dissatisfied with the deciding order and has accordingly on 27 July 2018 appealed to the High Court by way of case stated.

IN THE HIGH COURT

[16] The parties basically repeated their contentions made to the SCIT before the learned judge.

[17] However, the learned judge dismissed the appellant's appeal with costs of RM3,000 ('decision') and held, inter alia, as follows in the judgment reported in *Sunway Reit Holdings Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2023] MLJU 949; [2023] CLJU 809:

> [11] The issue before the SCIT was:
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> (a) whether the appellant is entitled to a full deduction of the interest expenditure incurred amounting to RM18,188,537.62 (this is 99.3% out of the total interest expenditure incurred amounting to RM18,316,912 which is after restricting the sum of RM128,374.38 against the tax-exempt distribution) apportioned to the taxable distribution amounting to RM24,468,528; and
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> (b) whether the respondent was correct to apportion expenditure amounting to RM18,316,912 between the taxable distributions and tax exempt distributions received by the appellant from Sunway REIT under s 33 of the ITA.
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> ...
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> [15] Based on the above, this court is of the view that the SCIT was correct in its finding and decision when it held that the amount received by the appellant from Sunway REIT and termed as 'Return of Capital' by the appellant was correctly brought to tax by the respondent as it is an income to the appellant.
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> [16] It is my view that the 'distribution of return of capital' as contended by the appellant is assessable to income tax as when it is distributed by Sunway REIT to the appellant, it has become an income at the hand of the appellant (recipient) and I find that there is no evidence produced by the appellant to show that there is the

relationship between the appellant's investments where appellant had injected/contributed capital to Sunway REIT.

[17] By virtue of s 61A of the ITA, when Real Estate Investment Trust (REIT) or Property Trust Fund distributed more than 90% of its total income to its unit holder, the REIT or Property Trust Fund company is exempt from tax in regard to its total income:

> 61A Exemption of Real Estate Investment Trust or Property Trust Fund
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> (1) Where in the basis period for a year of assessment ninety percent or more of the total income of the unit trust is distributed to the unit holder, the total income of the unit trust for that year of assessment shall be exempt from tax.
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> (2) In this section, 'unit trust' means a unit trust which is approved by the Securities Commission as Real Estate Investment Trust or Property Trust Fund, and listed on Bursa Malaysia.

[18] In the instant case, I find that when Sunway REIT claimed the capital allowance, the amount claimed has become an income to Sunway REIT and this income was later distributed by Sunway REIT to its unit holder, ie the appellant.

[19] Therefore, I view that when Sunway REIT distributed the amount, it is in actual fact distributing its income to the appellant and not as a return of capital as argued by the appellant.

[20] The SCIT had taken into consideration these facts before concluding that the amount received by the appellant from Sunway REIT is not the return of capital but instead, an income. This can be clearly seen in paras 10.2 to 10.6 and also paras 10.9 and 10.10 of the case stated.

[21] Based on the above, I am of the view that the finding and conclusion of facts and law by the SCIT was correct and there is no need for the court to disturb the SCIT decision which was made based on a correct evaluation of facts and law.

[22] Further, I find that the appellant did not produce any evidence to show who actually had contributed capital in respect of the qualifying assets including plant and machinery and industry buildings, owned and in use for the purpose of the business of the letting of real property done by the REIT.

[23] The argument by the appellant that pursuant to s 61(A) of the ITA that the unit holder is not assessed and charged to tax in respect of the distributions for the return of capital from REIT cannot be sustained as there has been no evidence produced by the appellant that the figures had been injected earlier to REIT.

[24] It is my view that for the appellant to receive the distribution of capital, the appellant must prove that there is the relationship between the appellant and the qualifying assets, including plant and machinery and industrial buildings claimed by Sunway REIT Management Sdn Bhd.

[25] Having perused the evidence produced before the SCIT, I find that there was no evidence adduced by the appellant either in the form of an agreement or issuance of the Board of Directors Resolutions that there is nexus between the appellant and the qualifying assets, including plant and machinery and industrial buildings

claimed by Sunway REIT Management Sdn Bhd for capital allowance and industrial building allowance in YA 2011.

[26] Based on the above, I am of the view that for the appellant to receive a distribution return of capital, there must be a realisation (change of goods, assets or service into cash or receivables through sale) of the capital between the REIT and the appellant ie withdrawal/selling off of the assets by REIT. However, in the present case, I find that there is no evidence produced by the appellant that there has been a withdrawal of assets by REIT to the appellant.

...

[31] The sale and purchase agreement only refers to the units purchased by the appellant from Sunway Bhd (vendor) and I find nowhere in the agreement states that the appellant shall receive the distribution return of capital being earlier capital injected in the qualifying assets, including plant and machinery and industrial buildings by Sunway Bhd in Sunway REIT Management.

[32] Further, I also find nowhere in the agreement states that the appellant had actually contributed to the construction of the building or the qualifying asset owned by Sunway REIT in order for the appellant to receive the distribution of return capital from the Sunway REIT.

[33] Even if the appellant had contributed to the construction of the building or the qualifying asset of the Sunway REIT, I find that there is no evidence to show that there is a realization or withdrawal if the building or qualifying asset for the appellant to receive the distribution of return of capital that has been injected to Sunway REIT.

[34] Having read the sale and purchase agreement dated 18 August 20211, I am of the view that it only explains on the appellant's agreement to acquire the entire business and undertaking including all assets and liabilities from Suncity for an aggregate purchase consideration as stipulated in the sale of business agreement duly executed between Sunway City Bhd and Sunway Bhd previously.

[35] Based on the above, the appellant is still holding the 986,634,185 units in REIT and I find that there is no evidence in the case stated that there has been a withdrawal or realisation of the capital in order for the appellant to receive a distribution of capital from Sunway REIT Management.

[36] Further, the Directors Resolution issued by the appellant dated 16 August 2011 only confirms and resolved the company (appellant) to acquire 986,634,185 units in Sunway REIT Management Sdn Bhd from Sunway City Bhd as instructed by Sunway Bhd and nowhere mention that the appellant had injected so much capital to Sunway REIT Management and further to receive distribution of capital upon withdrawal or realisation of the asset.

[37] The appellant in this appeal is a unit holder of 986,634,185 of REIT investment units in Sunway REIT Management Sdn Bhd. Under cl 3.3 of the deed signed between OSK Trustees Bhd and Sunway REIT Management Sdn Bhd dated 20 May 2010 (the deed) it clearly stated that the liability of each unit holder shall be limited to the unit holder's investment in Sunway REIT only.

A [38] Having perused the sale and purchase agreement dated 18 August 2011. I find that there are no provisions in the said agreement stating that the appellant is entitled to receive distribution return of capital from Sunway REIT upon injection of capital to the former. Therefore, I view that the distribution return of capital shall only be receivable by the appellant when the investment is ultimately sold.

B [39] From the evidence adduced in this appeal, I find that there is no evidence produced by the appellant to show that there is a withdrawal/selling of the REIT units to enable them to receive the distribution return of capital.

[40] Looking at the evidence as a whole, this court is of the view that the C distribution return of capital received by the appellant is an income that is assessable to income tax. Whatever amount the appellant received out of the units held in Sunway REIT, is an income to the appellant. The argument of the appellant cannot be sustained as a mere surrendering of rights does not make the payment of RM8,608,346 a non-taxable distribution without there being a destruction of the structure of the profit making apparatus of the appellant.

D [41] Reference is made to the case of *Ketua Pengarah Hasil Dalam Negeri v Perbadanan Kemajuan Ekonomi Negeri Johor* [2009] 4 MLJ 682; [2009] 5 CLJ 518; [2009] 2 MLRA 245 where the Court of Appeal had decided that:

> E On questions (1) and (2), the word 'income' means 'chargeable income' and hence, a tax exemption is given at the chargeable income level. In order to be disregarded under s 127(5) of the ITA, an exemption from tax should be legally deducted or claimed from chargeable income as gross income may or may not be eligible to tax. The basic rule is that 'income tax is a tax on income' and when there is no income, there can be no liability to tax, and the question of an F exemption cannot arise. Exemption is only relevant when there is chargeable income, but not otherwise.

[42] In determining the payment received by the appellant from Sunway REIT, the court must not be clouded by the name and terms given to the payment by the G parties. The payment can be termed in whatever name by the parties but what is most important, this court must look and determine the real nature and true character of the particular payment received.

[44] Coming back to the fact in the instant case, this court finds that there is no proof adduced by the appellant to show that there is any contractual obligation H between the appellant and Sunway REIT Management Sdn Bhd that the appellant shall receive distribution return of capital.

[45] It is to be noted that the ITA does not define the word 'distribution'. In this current appeal, the term 'distribution of return of capital' was only used by the appellant to describe the payment received from Sunway REIT Management in I their correspondence. What is the meaning of 'distribution'? According to *Black's Law Dictionary* (10th Ed) distribution carries the meaning of:

> Distribution — the passing of personal property to an intestate decedent's heirs; the process of diving an estate after realising its moveable assets and paying out of them its debts and other claims against the estate.

[46] Pursuant to the Director's Resolution of the appellant dated 16 August 2011, it was resolved that the appellant shall acquire 986,634,185 units in Sunway REIT from Sun City/Sunway Bhd.

(See — p 97 of exh D1.)

[47] Based on the said Director's Resolution, it is clear that the appellant only agreed to purchase and to acquire the entire 986,634,185 REIT units from Sunway Bhd. No specific clauses in the Director's Resolution mentioned that in acquiring the REIT units, the appellant shall be entitled to the distribution of return of capital from Sunway REIT Management.

[48] In addition, referring to the letter of assignment dated 29 August 2011 from Sunway Bhd to the appellant discussed on the settlement of the purchase consideration of RM1,095,163,945.35 for 986,634,185 units in Sunway REIT pursuant to the SPA which has been executed between the parties on 18 August 2011. I notice that the said letter also mentioned that the purchase consideration shall be settled in the following manner:

(a) RM989,753,502 to be settled by way of assuming Sunway Bhd's debt; and

(b) RM105,410,443.35 to be settled by way of financing from Sunway Treasury Sdn Bhd and the appellant shall procure Sunway Treasury Sdn Bhd to pay Sunway Bhd on 31 August 2011.

(See — p 102 of exh D1.)

[49] It is an undisputed fact that the appellant had purchased the REIT units from Sunway Bhd in certain manner to be settled. There is no issuance of the Director's Resolution by the appellant to show that 986,634,185 REIT units have been withdraw by the appellant to enable them to receive the distribution return of capital.

[50] It is to be noted that a voluntary character of a payment is not a conclusive factor in determining whether the payment is not subject to tax.

[51] It is well accepted that the leading provisions in determining the eligibility of business deductions are sub-ss 33(1) and 39(1) of the ITA. Section 33 is subject to s 39 which prohibits deductions specified in that section. Thus, I view that s 33 and s 39 work in reverse-tandem; an expense could meet the requirements of s 33 being wholly and exclusively incurred in the production of income yet it may not be deductible if it is specifically disallowed in s 39 of the ITA.

[52] The nexus between these two provisions is best summed up by Lee Hun Hoe CJ (as he then was) in the case of *Director-General of Inland Revenue v Rakyat Berjaya Sdn Bhd* [1984] 1 MLJ 248; [1983] 1 MLRA 281; [1984] 1 CLJ Rep 108, inter alia:

> The relationship between the deduction allowing provisions of s 33 and the deductions disallowing provisions of s 39 is explained by Chang Min Tat J, as hethen was, in *DGIR v LTS* [1974] 1 MLJ 187; [1985] 1 MTC 166. To be deductible a payment must: (i) be authorised as a deduction by s 33(1); and (ii) not be disallowed by s 39.

(See also *Margaret Luping & Ors v Ketua Pengarah Hasil Dalam Negeri* [2000] 3 CLJ 409; [2000] 1 MLRA 348; [2000] 2 AMR 1363; *Syarikat Jasa Bumi (Woods) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2000] 2 MLJ 317; [2000] 1 MLRA 909; [2000] 2 CLJ 481.)

[53] Having perused the evidence produced before the SCIT, I agree with the approach taken by the respondent that the calculation of the apportioned interest expenditure shall only be made between taxable and non-taxable distributions.

[54] This is because the distribution return of capital claimed by the appellant still constitutes the gross income of the appellant since there is no evidence produced by the appellant to show that there is a realisation/withdrawal of capital made by Sunway REIT Management Sdn Bhd as to enable the appellant to receive any kind of distribution return of capital.

[55] Based on the above, the respondent's computation shall be:

RM24,468,528 x RM18,316,912 = RM13,479,509

RM33,249,572

RM24,468,528 = Taxable Distribution received in YA 2011

RM33,249,572 = Total Distribution received in YA 2011

RM18,316,912 = interest expenditure incurred in YA 2011

RM 13,479,509 = deductible interest expenditure

[56] The appellant on the other hand claimed that they should be entitled for a deduction of interest incurred to the extent of RM 18,188,537 against the total income of RM24,468,528 as per the calculation below:

RM24,468,528 x RM18,316,912 = RM18,188,537

RM24,641,226

[57] However, based on the documents and evidence produced during the hearing, this court is of the view that the distribution return of capital duly claimed by the appellant still constitutes the gross income of the appellant in YA 2011 as failure to prove the nexus between the qualifying assets, including plant and machinery and industrial buildings, owned and in use for the purpose of the business of the letting of the real property done by the REIT and the appellant and subsequently for the appellant to enjoy the said non-taxable distribution in YA 2011.

[58] Further, I find that there is no mechanism shown by the appellant to this court on how they shall receive the said non-taxable distribution. No agreement or Board of Directors Resolutions were produced by the appellant to prove that they are entitled to distribution return of capital on any qualifying assets, including plant and machinery and industrial buildings, owned and in use for the purpose of the business of Sunway REIT is ultimately sold.

[18] The appellant is dissatisfied with the decision and has on 17 August 2022 appealed to the Court of Appeal.

FINDINGS OF THIS COURT

[19] Based on the rival contentions put forth by the parties before us, there are in our view two-prong related issues which are determinative, viz:

(a) whether the distribution of return of capital of RM8,781,044 is a non-taxable income; and

(b) whether s 33(1) of the ITA provides any room for apportionment of the deductibility of interest expenditure based on the taxable income received by the appellant?

[20] It is well settled that our appellate function here is merely a review of the decision and Abdul Rahman Sebli JCA (now CJ (Sabah and Sarawak)) lucidly held as follows in *Iskandar Coast Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2019] 5 MLJ 236; [2019] 6 MLRA 219 (CA):

> [19] As to the proper approach to be taken by the appellate court in deciding whether to allow or to dismiss an appeal against the exercise of discretion by the lower court, we need only refer to the Federal Court case of *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150; [1981] 1 MLRA 24; [1981] CLJ Rep 101 where Abdoolcader J (as he then was) delivering the judgment of the court said at pp 25–26:
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> > (b) Review of discretion by an appellate court.
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> > There is a catenation of cases on this point and it will suffice to cull and refer to a few which restate the well-settled principles. An appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong but there is a presumption that the judge has rightly exercised his discretion and the appellate court must not reverse the judge's decision on a mere 'measuring cast' or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion (*Charles Osenton & Co v Johnston* [1942] AC 130, 148 (at p 148) per Lord Wright). *The Privy Council in Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228; [1964] 1 MLRA 599 *held that an appellate court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice, referring to Evans v Bartlam* [1937] AC 473.
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> The House of Lords, approving the decision of the English Court of Appeal in *Ward v James* [1966] 1 QB 273, held to the same effect in *Birkett v James* [1978] AC 297 (at pp 317, 326). For good measure, we would refer to the felicitous expression of Goulding J in *Re Reed (a debtor)* [1979] 2 All ER 22, 25 on this point (at p 25):
>
> > *... the duties of an appellate court in such matter as this are, in my judgment, confined to those normally exercisable where the lower court has a discretion, that is to say, we are not justified in setting aside or varying an order simply because we may think we might have come to a different conclusion ourselves on similar material. We can only interfere if either we can see that the court below has applied a wrong principle, or has*

A *taken into account matters that are in law irrelevant, or has excluded matters that it ought to have taken into account, or otherwise that no court, properly instructing itself in the law, could have come to the conclusion which in fact was arrived at.*

B See also *MY v Comptroller-General of Inland Revenue* [1972] 2 MLJ 110 (FC) and *K-ZAQ (M) Sdn Bhd v Johnson Matthey Public Ltd & Ors* [2014] 1 MLJ 272 (CA).

C **[21]** Upon our review of the first issue on taxability of the distribution of return of capital of RM8,781,044 received by the appellant from Sunway REIT, we find that this is a question of mixed fact and law.

D **[22]** According to the appellant, the return of capital is the tax-exempt industrial building allowance claimed by Sunway REIT that has been distributed to the appellant.

E **[23]** The SCIT however found in the deciding order and thereafter affirmed by the learned High Court judge in paras [22] to [40], [42] to [50] as well as paras [57] to [58] of the judgment that the appellant as unit trust holder was not conferred any interest in and may not exercise any rights in respect of the assets of Sunway REIT based on the Sunway REIT trust deed. Consequently, the appellant does not enjoy the tax benefit of the industrial building allowance as claimed.

F **[24]** We have scrutinised the relevant evidence particularly the SPA and Sunway REIT trust deed but we do not find the learned High Court judge is plainly wrong in any way. In gist, we do not find any cogent proof that directly connects the appellant and the industrial building allowance claimed to be
G enjoyed by Sunway REIT. This is a finding of fact which the appellate court generally does not disturb: see *IJM Corp Bhd v Zamri bin Hj Ibrahim & Anor* [2014] 2 MLJ 335; [2014] 1 AMR 97 where Rohana Yusuf JCA (later PCA) held as follows with emphasis added by us:

H [20] *We are mindful that we are not at liberty to disturb findings of facts by a trial judge unless the finding is erroneous and is contrary to the weight of evidence or where there is failure of judicial appreciation of facts or law or that the error is so manifest that it had caused injustice to the appellant, all of which warrant appellate intervention*. In our view the findings of the learned judge in the present case were not specific findings of ostensible facts but facts, which could be inferred from specific facts. 'For that
I reason we are not restrained by virtue of s 69(4) of the Courts of Judicature Act 1964 *to form our own opinion on the conclusion'.*

[25] We also specifically refer to the case of *Kenny Heights Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2015] 4 MLJ 487; [2015] 5 CLJ

923 where Abdul Wahab Patail JCA held as follows with emphasis added by us:

> [24] We make the general observation that courts, acting in accordance with the law, are at all times bound by the legislation placing jurisdiction and authority in specialised bodies such as the SCIT. *The legislation specified that the deciding order of the SCIT is final and allowed appeals to the court on question of law and not any grievance*. It underlines, within the SCIT's jurisdiction, its authority, and prevents the courts being buried under an avalanche of tax appeals by parties unhappy with the determination of the KPHDN and the SCIT.
>
> [25] Courts must also bear in mind the SCIT's specialisation. Dealing with terms and practises of the business and the business community enables them to have a special insight, understanding and appreciation of the evidence and facts, to make the findings drawn from those evidence and facts. *While a finding of fact often touches upon the law, the determining factor in the finding is their special insight and appreciation of the facts. Hence, unless it is demonstrated that SCIT had erred on a question of law, resulting in a manifest error in the deciding order, the court cannot intervene*, as it would amount to interference contrary to the intent of legislation setting up and empowering the SCIT (see *Lower Perak Co-operative Housing Society Berhad v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713; [1994] 3 CLJ 541 (SC)).

[26] We are thus satisfied that the return of capital made by Sunway REIT to the appellant is distribution of income as rightly found by the SCIT in the deciding order and affirmed by the learned High Court judge in paras [15] to [21] and thereafter summarised in para [61] of the judgment. As such, this income is taxable.

[27] Nonetheless, we are mindful that it was an agreed fact between the parties before the SCIT that the return of capital is not taxable; see paras 7.1(vi), 7.2(vi) and 7.2 (x) of the agreed facts. However, we are of the view that it is not binding on the SCIT because this a legal and not a factual issue. The case of *Chua Lip Kong v Director-General of Inland Revenue* [1982] 1 MLJ 235 relied by the appellant is thus distinguishable.

[28] In the premises, there is no misdirection by the learned High Court judge on this issue of distribution of capital that warrants appellate intervention.

[29] That notwithstanding and moving on to the other issue of apportionment of the deductibility of interest expenditure based on the taxable income received by the appellant, we observed that there are competing computations advanced by the parties. The appellant's computation is set out in para [56] of the judgment whereas the respondent's computation is set out in para [55] of the judgment.

[30] The SCIT as well as the learned High Court judge adopted the respondent's computation premised on the basis that the apportioned interest expenditure calculation has to be made between taxable and non-taxable distributions; see paras [53] and [54] of the judgment.

[31] This is an issue of law. According to the appellant, there is no provision in s 33(1)(a) of the ITA that allowed the respondent to apportion deductible expenses. This s 33 of the ITA, subject only to s 39 of the ITA, is an exhaustive provision dealing with deduction of expenditure from the taxable income for taxation purposes. In this regard s 33 of the ITA reads:

> 33 Adjusted income generally
>
> (1) Subject to this act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deducting from the gross income of that person from that source for that period all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of gross income from that source, including:
>
> (a) subject to subsection (2), any sum payable for that period (or for any part of that period) by way of interest upon any money borrowed by that person and:
>
> (i) employed in that period in the production of gross income from that source; or
>
> (ii) laid out on assets used or held in that period for the production of gross income from that source;
>
> (b) rent payable for that period (or for any part of that period) by that person in respect of any land or building or part thereof occupied by him in that period for the purpose of producing gross income from that source;
>
> (c) expenses incurred during that period for the repair of premises, plant, machinery or fixtures employed in the production of gross income from that source or for the renewal, repair or alteration of any implement, utensil or article so employed, other than implements, utensils, articles (the expenditure on which would be qualifying plant expenditure for the purposes of Schedule 3) or any means of conveyance, excluding the cost of reconstructing or rebuilding:
>
> (i) any premises, buildings, structures or works of a permanent nature;
>
> (ii) any plant or machinery; or
>
> (iii) and
>
> (d) such other deductions as may be prescribed.
>
> (2) Where a person, being a person to whom paragraph (1)(a) applies in relation to gross income from a business of his for the basis period for a year of assessment and in relation to borrowed money, has made (otherwise than for the purpose of producing that gross income) any loan of money or any investment in movable or

immovable property, and the loan or any part thereof is outstanding at any time in that period or the investment or any part thereof is held by him at any time in that period and it appears to the Director General that the loan or any part thereof or the investment or any part thereof has been financed wholly or partly or directly or indirectly out of the borrowed money:

(a) the total sum payable for that period or any part thereof by way of interest on that borrowed money shall be deemed to accrue evenly over that period or part thereof, and so much of that sum as is thus found to accrue during each calendar month shall be taken to be the monthly figure for the purposes of this subsection;

(b) if at the end of any calendar month the aggregate of:

(i) the amount of the loan then outstanding if any; and

(ii) the cost of so much of the investment as is held by him at that time if any, is less than the amount of that borrowed money, the monthly figure for that month shall be reduced by an amount which bears to that monthly figure the same proportion as that aggregate bears to the amount of that borrowed money or by an amount which in the opinion of the Director General is just and reasonable in all the circumstances;

(c) if at the end of any calendar month the aggregate mentioned in the preceding paragraph is more than the amount of that borrowed money, the monthly figure for that month shall be reduced to nil or to an amount which in the opinion of the Director General is just and reasonable in all the circumstances; and

(d) the amount of the deduction to be made for the period in respect of that borrowed money shall be an amount consisting of the aggregate of:

(i) the monthly figures for all calendar months to which paragraph (b) or (c) applies, as reduced by either of those paragraphs; and

(ii) the monthly figures for the other calendar months.

(3) In subsection (2) 'calendar month', in relation to a basis period or part thereof, means a period which is included in that basis period or part thereof and is either:

(a) one of the twelve months of the Gregorian calendar; or

(b) where that basis period or part thereof includes a part, but not the whole, of such a month, that part of that month.

(4) For the purposes of paragraph (1) (a) and subsection (2), where any sum payable for a basis period for a year of assessment is not due to be paid in that period, the sum shall when it is due to be paid be deducted in arriving at the adjusted income of a person for that period.

[32] Consequently, the appellant's position is that its interest expenditure incurred for the relevant year of assessment is wholly deductible from the taxable income based on s 33(1)(a) of the ITA. Furthermore, the deduction of

this interest expenditure is not prohibited by s 39 of the ITA on non-allowable deductions.

[33] We have carefully read s 33(1) and s 39 of the ITA and do not find that apportionment of expenditure is statutorily provided therein. Public Ruling No 2/2011 is thus ultra vires and inapplicable here. In the premises, the computation of the deductible interest expenditure done by the respondent based on the apportionment of the appellant's income and return of capital (but which has been found to be also taxable income) that has been affirmed by the SCIT as well as the learned judge is flawed.

[34] We are aware the respondent has alluded to and relied on *Ketua Pengarah Hasil Dalam Negeri v Perbadanan Kemajuan Ekonomi Negeri Johor* [2009] 4 MLJ 682; [2009] MSTC 4399 to justify its stance in so apportioning but the case is easily distinguishable on the facts wherein the taxpayer has two sources of income, viz business income and dividends. However, the appellant here has only one source of income from Sunway REIT.

[35] In our view, the learned judge in having endorsed the respondent's wrongful apportionment on the deductibility of interest expenditure here is hence a misdirection that warrants appellate intervention.

[36] Consequently, we find that the proper computation for purposes of deductibility of the interest expenditure is that as calculated by the appellant as follows:

(a) apportionment to taxable distribution: RM24,468,528/RM24,641.226 x RM18,316,912
= RM18,188,537; and

(b) apportionment to non-taxable distribution/tax-exempt distribution: RM172,698/RM24,641,226 x RM18,316,912
= RM128,375.

CONCLUSION

[37] For the foregoing reasons, we allow the appeal and the decision of the High Court is set aside. We further order that the full amount of the interest expenditure amounting to RM18,188,537.62 incurred by the appellant is allowed for deduction in full against the taxable income for the year of assessment 2011.

[38] The respondent shall pay costs of RM10,000 here and below to the appellant.

Appeal allowed, High Court's decision set aside and full amount of interest expenditure amounting to RM18,188,537.62 incurred by the appellant ordered to be allowed for deduction against the appellant's taxable income for Year of Assessment 2011.

Reported by Ashok Kumar